

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

Szeremeta  
PL-II

**FILE:** B-220079 **DATE:** December 16, 1985  
**MATTER OF:** Data Resources, Inc.

**DIGEST:**

Where protester's initial proposal is found technically unacceptable although capable of being made acceptable, but protester fails to submit a timely response to agency's request for clarification, agency's subsequent exclusion of protester from negotiations with remaining offeror is proper since without additional information, protester's proposal was technically unacceptable.

Data Resources, Inc. (DRI) protests the rejection of its proposal by the Federal Emergency Management Agency (FEMA) under request for proposals (RFP) No. FMW-85-R-2057. DRI's proposal was evaluated and found to be technically unacceptable but capable of being made acceptable through clarifications. FEMA refused to consider DRI's proposal after DRI failed to submit a timely response to clarification questions sent to DRI. DRI states that it never received FEMA's request for clarifications and argues that FEMA unreasonably excluded DRI from the competition.

We deny the protest.

The RFP was for the identification and analysis of the supply, bottleneck and dislocation problems expected to occur in the United States' civilian economy during an extended military mobilization. Two of the four proposals received were rejected as technically unacceptable, and the remaining two proposals, submitted by DRI and The Analytical Sciences Corporation (TASC), were found technically unacceptable but capable of being made acceptable. Thereafter, DRI and TASC were sent written

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questions and were informed that responses were due by a specific date. FEMA received a response from TASC but none was received from DRI.

FEMA contacted DRI regarding its failure to submit a response. At that time, DRI indicated that it had never received the questions sent by FEMA and requested that the firm be provided an opportunity to submit a response. FEMA advised DRI that no late submissions would be considered unless the requirements of section 15.412 of the Federal Acquisition Regulation (FAR), FAC, 84-7, April 30, 1985, regarding the acceptance of late proposals or modifications were met. Since there was no evidence that any of the exceptions which permit the consideration of late proposals or modifications were applicable, FEMA advised DRI that any late submission would not be considered.

The response submitted by TASC was evaluated by the technical evaluation panel and TASC's proposal was found to be acceptable. Discussions were then conducted with TASC and due to an urgent and compelling need to award the contract, award was made to TASC on September 30, despite DRI's prior protest to our Office.

DRI indicates that its initial proposal, as well as TASC's, had been found capable of being made acceptable by FEMA and that based on this determination, a competitive range comprised of DRI and TASC was established. DRI argues that notwithstanding its failure to respond to the questions sent by FEMA, the firm should have been included in further discussions since based on its initial proposal, the firm still stood a reasonable chance of being selected for award. DRI notes that its initial proposal was within 5 points of TASC's revised proposal and that substantial changes were not required to address adequately the questions raised by FEMA. Since only one offeror was left within the competitive range, DRI argues that FEMA's decision to exclude it from further consideration is subject to close scrutiny and, under the circumstances, should not be upheld.

FEMA contends that the initial questions sent to the offerors were merely requests for clarification and that DRI was never considered to be within the competitive range. FEMA states that DRI was given the same opportunity to participate as TASC, and through no

fault of the government, DRI failed to respond timely to the agency's request for clarification of its proposal. FEMA argues that its refusal to consider any late submission by DRI was entirely consistent with the late proposal and modification provision contained in the solicitation and that DRI was properly excluded from further negotiations.

We agree FEMA was clearly justified in refusing to consider any late proposal modification by DRI. See Woodward Assoc., Inc., et al., B-216714 et al., Mar. 5, 1985, 85-1 CPD ¶ 274. Further, we think that DRI's proposal was properly excluded from the subsequent negotiations due to its failure to respond to the agency's request for clarification.

It is well established that the determination of whether a proposal should be included in the competitive range is a matter primarily within the contracting agency's discretion. Our Office will not disturb such a determination unless it is shown to be unreasonable or in violation of procurement laws or regulations. Leo Kanner Assoc., B-213520, Mar. 13, 1984, 84-1 CPD ¶ 299. In addition, we will closely scrutinize any determination that results in only one offeror being included in the competitive range. Falcon Systems, Inc., B-213661, June 22, 1984, 84-1 CPD ¶ 658.

Here, both proposals were initially found technically unacceptable, although capable of being made acceptable. The questions sent by FEMA to both offerors were part of the ongoing process to determine which offerors were within the competitive range. Both offerors were provided the same opportunity to revise their proposals and we note that after receiving the information requested of TASC, FEMA concluded that TASC's previously unacceptable proposal was now acceptable. While DRI's initial proposal was within 5 points of TASC's revised proposal, the weaknesses in DRI's initial proposal remained and the proposal was still technically unacceptable. In contrast, TASC's revised proposal was now considered acceptable and under these circumstances, we find that FEMA could reasonably exclude DRI from the competitive range.

The protest is denied.

*Harry R. Van Cleve*

Harry R. Van Cleve  
General Counsel